
INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES COGHLAN,

Complainant,

v.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF COLORADO AT BOULDER,
Respondent.

The hearing in this matter was convened on June 13, 1995, and concluded on June 23, 1995, in Denver, CO before Administrative Law Judge Margot W. Jones. Respondent appeared at the hearing through Elvira Strehle-Henson, Assistant University Counsel. Complainant, James Coghlan, was present at the hearing and represented by Gregg Friedman, Attorney at Law.

Respondent called the following individuals to testify at hearing: Sandra Rosenthal, Purchasing Agent II; Richard Deffke, Senior Auditor; David Sisneros, Purchasing Agent III; Cathy Doyle, Production Manager; Dave Makowski; Assistant Vice President of Information and Computing; Roger Cokes, Purchasing Agent Supervisor; and Mary Ann Pittman, Director of the Office of Buying and Contracting.

Complainant testified in his own behalf and called no other witnesses.

Respondent's exhibits 2, 3, 5, 13, 16, 29 and 30 were admitted into evidence without objection. Respondent's exhibit 10 was admitted into evidence over objection.

Complainant's exhibits B, D through Q, V, X through Z and BB were admitted into evidence without objection.

MATTER APPEALED

Complainant appeals a disciplinary demotion.

ISSUES

1. Whether Complainant engaged in the conduct for which discipline was imposed.
2. Whether the conduct provided basis to impose a disciplinary

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action.

3. Whether Respondent's decision to demote Complainant from a Purchasing Agent IV to a Purchasing Agent II was arbitrary, capricious or contrary to rule or law.

4. Whether either party is entitled to an award of attorney fees.

FINDINGS OF FACT

1. Complainant, James Coghlan (Coghlan), is employed by the Buying and Contracting Office at the University of Colorado at Boulder (UCB). He has been so employed for approximately eleven years. Coghlan was employed as a Purchasing Agent IV, until March 6, 1995, when he received a disciplinary demotion to a Purchasing Agent II position. The appointing authority for Coghlan's position and his direct supervisor was Mary Ann Pittman (Pittman), the Director of Buying and Contracting.

2. Coghlan has not been previously disciplined during his employment with the Buying and Contracting Office. His job performance was rated as "standard" during his yearly job performance reviews in 1993 and 1994.

3. Coghlan is a Certified Purchasing Manager and a Certified Purchasing Buyer. These certifications required Coghlan to acquire experience in the field of buying and purchasing. Coghlan was also required to successfully complete an examination which tested his competence in the field of buying and purchasing and he attends continuing education seminars.

4. As a Purchasing Agent IV, Coghlan supervised six purchasing agents. He supervised his subordinates in their duties buying and contracting, assuring their compliance with State laws, rules, regulations, policies and procedures. Coghlan, not only supervised purchasing agents, but he also performed duties related to the buying and contracting request of UCB departments. Coghlan, as a Purchasing Agent IV, was expected to know and understand laws applicable to this field to avoid legal liability for his employer.

5. Purchasing agents attend training meetings every two weeks. Coghlan, along with another supervising purchasing agent, lead the bi-monthly training meetings. At each meeting, the State procurement code is reviewed with the purchasing agents. The State procurement code governs the procedures to be used statewide by agencies purchasing goods and services.

6. At the bi-monthly training meetings, purchasing agents are trained in the procedure to follow when a vendor working under a State contract fails to provide satisfactory goods or services.

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Purchasing agents are trained that a vendor must be given written notice of its failure to perform satisfactorily and be provided a period of time in which to correct its unsatisfactory performance.

If after receiving notice of unsatisfactory performance, and after being provided a period of time in which to correct its performance, the vendor continues to perform unsatisfactorily, a UCB purchasing agent may request permission from the State Division of Purchasing to cancel the contract with the vendor. Approval to cancel a contract from the State Division of Purchasing must be received in writing. Purchasing agents are trained to honor contract provisions requiring notice of cancellation of the contract within a specified period.

7. Coghlan participated in training purchasing agents in the procedures to be followed when a UCB department has a complaint with a vendor working under contract providing goods or services.

Coghlan understood, and trained purchasing agents, in the above described procedures.

8. A mandatory State award requires that State agencies utilize the vendor to which a contract is awarded to obtain the goods and services specified in the contract. Exception can be made to this procedure, where there is an emergency. An emergency award can only be justified if there is a threat to life or property, and a purchase outside the State contract can only occur one time. Coghlan was aware of, and trained purchasing agents, in this procedure.

9. A State agency might also use a vendor, other than the vendor to which there has been a mandatory State contract awarded, if the outside vendor is shown to be the sole source of a product or service a State agency requires. In this circumstance, the State agency is required to complete a document which provides justification for using a sole source vendor. This document must be submitted to the State Division of Purchasing for approval. The justification must include information establishing that there are no other vendors providing the needed product or service. Coghlan was aware of, and provided training for purchasing agents, in this area.

10. University Management Systems (UMS) is responsible for serving the University of Colorado's data processing needs. UMS provides data processing services to all the University of Colorado campuses. The Executive Director of UMS and the Assistant Vice President for Computing and Information Systems is David Makowski, and the Production Manager is Cathy Doyle (Doyle).

11. UMS sends out microfiche for processing to a company which specializes in this service. Coghlan and Doyle worked with David Sisneros (Sisneros), a Purchasing Agent III for the State Division of Purchasing, to prepare bid specifications for microfiche

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processing. Doyle and Coghlan were of the opinion that UMS had unique microfiche processing needs.

12. In September, 1993, Coghlan and Doyle wrote Sisneros advising him of UMS' unique microfiche processing needs. Sisneros responded to Coghlan and Doyle advising them that the services required by UMS were no different than other State agencies, therefore, UMS had to use the services of the company awarded the State contract.

13. A microfiche processing contract was awarded to Output Technologies, in December, 1993. The contract awarded to Output Technologies was a five year, \$250,000.00 contract.

14. Output Technologies is located in southeast Denver and UMS is located on the Boulder campus. Output Technologies was not able to meet the needs of UMS. UMS' primary concern was with Output Technologies' inability to process the microfiche quickly enough and its incorrect billing of UMS for services rendered.

15. In July and September, 1994, Doyle met with representatives of Output Technologies to advise the company of her dissatisfaction with the services provided. Output Technologies' representatives reluctantly discussed Doyle's concerns, but Output Technologies' performance did not improve. Ultimately, UMS withheld payment for incorrect billing because of Output Technologies' unwillingness to resolve billing concerns.

16. On November 11, 1994, Dave Makowski, Doyle's supervisor, advised Mary Ann Pittman that UMS had to resolve the problem with microfiche processing more quickly. Makowski's request to resolve the problem was understood to mean that UMS wanted to be let off of the State contract and be permitted to contract with a microfiche processing company of its choosing.

17. In response to Makowski's communication, Pittman and Coghlan worked together to prepare a letter, dated November 14, 1994, advising Sisneros of the need to cancel UMS' microfiche contract with Output Technologies. This communication was the first time that Sisneros was advised, in writing, of the problems with the Output Technologies. Coghlan followed up the letter to Sisneros with a telephone call. During the telephone conversation, Coghlan believed that he understood Sisneros to give UMS permission to go off of the State contract.

18. On November 14, 1994, Pittman was advised by Coghlan that Sisneros agreed to allow UMS to go off of the microfiche contract with Output Technologies. Pittman advised Coghlan, based on the information she was provided by him, that UMS could enter into a sole source contract with another microfiche processing company. Pittman was unaware Coghlan did not obtain Sisneros' approval, in

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writing, to go off of the contract with Output Technologies.

19. Output Services is a small Boulder company located in the Gunbarrel area. The company is owned and operated by a husband and wife. The company provides microfiche processing services. Output Services was the company that UMS wanted to use to process microfiche. On December 5, 1994, Coghlan called representatives of Output Services to give them verbal approval to do business with UMS to provide microfiche processing services.

20. On December 7, 1994, Output Technologies was given one day verbal notice by Coghlan to stop microfiche processing services for UMS.

21. On December 7, 1994, a representative of Output Technologies contacted Coghlan to inquire why they were being asked to stop service to UMS. Coghlan responded that Sisneros gave approval for UMS to use another vendor.

22. Sisneros learned from the representative of Output Technologies that the company's services were not going to be used by UMS. Sisneros contacted Coghlan on December 9, 1994, advising him that he did not give Coghlan approval to use another vendor. Sisneros asked Coghlan to provide him with documentation of the problems with Output Technologies and documentation that Output Services could meet UMS' needs.

23. On December 19, 1994, Sisneros visited Output Services to observe its physical facility. Sisneros observed that Output Services had less capability to provide fast service than did Output Technologies. Based on the equipment shown to Sisneros by Output Services' owner, the company would require twice as much time to produce the same volume of work as Output Technologies. Sisneros found that Output Services had no back up equipment. In the event of an equipment breakdown, the company's production time would be even longer.

24. Output Services' technical capability concerned Sisneros because the information provided to Sisneros by Coghlan focused on UMS' dissatisfaction with Output Technologies speed in processing microfiche. Sisneros found that Output Services could only offer a company location which is in closer proximity to UMS, thus expediting delivery of processed microfiche.

25. Based on the bid specifications used in 1993, if Output Services submitted a bid for a State contract, it would be deemed to be unresponsive because the company lacks the necessary equipment and output capability.

26. Coghlan's handling of the microfiche processing contract for UMS violated State procurement rules, a provision of the contract

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with Output Technologies, the mission statement of the UCB Office of Contracting and Buying and policies related to State purchasing approval for a sole source contract.

27. State Procurement Rules require that Coghlan obtain written approval from the Division of Purchasing to purchase supplies or services other than those on a mandatory price agreement. Coghlan failed to obtain written approval to allow UMS to cease using the services of Output Technologies and to begin using the services of Output Services.

28. A provision of the State contract with Output Technologies provided that notice of intent to terminate the contract should be provided, in writing, 30 days prior to termination. Coghlan failed to give Output Technologies 30 days written notice. Coghlan gave the company one day verbal notice.

29. Coghlan also failed to obtain prior approval to contract with Output Services.

30. The mission statement for the Office of Buying and Contracting required that Coghlan follow all federal and state law, and all University of Colorado rules and regulation, to insure accountability to the public and fairness to vendors. Coghlan's action in failing to give Output Technologies 30 days written notice of the State's intent to terminate even a part of the contract was unfair.

31. Coghlan failed to work with the State Division of Purchasing when he failed to document the problems UMS had with Output Technologies. Coghlan also failed to work with the Division of Purchasing when he did not provide a sole source justification for use of the services of Output Services to the Division for review and approval.

32. UMS was permitted to use the services of Output Services from December 9, 1994, to January 31, 1995. Both Output Technologies and Output Services threatened to sue the State for breach of contract. On February 1, 1995, UMS was directed to again use the services of Output Technologies.

33. Based on the information Pittman received, she decided to meet with Coghlan for a Board Rule R8-3-3 meeting. On February 15, 1995, Coghlan and Pittman met to discuss Coghlan's actions. Coghlan admitted during this meeting that he responded to the pressure exerted by Doyle and Makowski, and in so doing did not follow the appropriate procedures and exposed the University to liability.

34. On February 27, 1995, Coghlan submitted a written response explaining his actions. Based on the information Pittman received

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during the February 15 meeting, and in Coghlan's written response, Pittman concluded that Coghlan failed to understand the gravity of his actions. Pittman further concluded that Coghlan could not be trusted to supervise other purchasing agents. Pittman concluded that she relied on the experience and expertise of the purchasing agent IV position to advise and direct work activities in the office. Pittman believed that Coghlan's behavior during this incident, in conjunction with his responses during the R8-3-3 process, established that he was not capable of supervising purchasing agents because he lacks the knowledge and ability.

35. By notice dated March 6, 1995, Coghlan was advised that he was demoted from a Purchasing Agent IV (pay grade 101, step 4) to a Purchasing Agent II (pay grade 87, step 7). This resulted in a reduction in pay, totalling approximately \$1,000.00 per month.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on Respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent contends that it sustained its burden to establish that Complainant engaged in the conduct for which discipline was imposed. Respondent further contends that the conduct proven to have occurred warranted disciplinary action. Finally, Respondent maintains that it established that a disciplinary demotion was neither arbitrary, capricious nor contrary to rule or law.

Complainant argues that the discipline imposed was too severe. Complainant maintains that because he was not previously disciplined, absent a showing that the incident which gives rise to this appeal was flagrant and serious, only a corrective action was warranted. It is Complainant's contention that his conduct was neither flagrant nor serious.

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Complainant maintains that Pittman, the appointing authority, was involved in the material aspects of the transaction involving Output Technologies and Output Services. Complainant contends that Pittman failed to raise objection to the procedure followed until after it came into question. Complainant asserts that Pittman was not diligent in her duty to supervise him and attempts to shift the burden off herself by disciplining Complainant.

At hearing, Complainant also appeared to challenge the Respondent's contention that he failed to follow rules and procedures. Complainant contends that there was no rule or procedure that required the transactions occurring in this case to be placed in writing. Complainant further contends that the contract provision that he is alleged to have violated when he gave Output Technologies one day verbal notice was a provision which dealt with cancellation of the entire contract.

The evidence presented at hearing established Complainant knew or should have known that the procedures he followed in handling the State contract for microfiche processing services was contrary to State Procurement Rules, established policies of the Office of Buying and Contracting and sound business practices among Certified Purchasing Managers and Certified Purchasing Buyers.

The evidence further established that Complainant did not fully inform Pittman of the information he had available to him. He failed to advise Pittman that he did not receive written authorization from the Division of Purchasing for UMS to go off of the mandatory State contract. He failed to advise Pittman that he did not submit a sole source justification to the State Division of Purchasing for review and approval. He did not advise Pittman that he gave Output Technologies one day oral notice of the termination of their contract with the State.

It was reasonable for Pittman to expect Complainant as a Purchasing Agent IV to be aware of and to comply with the established rules, policies and procedures related to State contracting. It was further a reasonable expectation that Complainant not respond to the pressures of a University Department, to the exclusion of compliance with rules, policies and procedures.

Complainant's conduct was proven to have been flagrant and serious because Complainant failed to comply with established policies and procedure, and he exposed the State to liability. The disciplinary measure imposed was within the range of discipline available to a reasonable and prudent administrator.

There is no basis upon which to conclude that either party is entitled to an award of attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

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CONCLUSIONS OF LAW

1. Respondent established that Complainant engaged in the conduct for which discipline was imposed.
2. The conduct proven to have occurred justified the imposition of discipline.
3. The decision to impose a discipline demotion on Complainant was neither arbitrary, capricious nor contrary to rule or law.
4. Neither party is entitled to an award of attorney fees.

ORDER

The action of the Respondent is affirmed. The appeal is dismissed with prejudice.

DATED this 7th day of
August, 1995, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$671.00**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the

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Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the 7th day of August, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

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